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In the Supreme Court of the United States

October Term, 1974
No. 74-1100

ELIZABETH M. BRADY,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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TABLE OF CONTENTS

	PAGE
Petition	1
Opinion Below	2
Jurisdiction	2
Question Presented	2
Constitutional and Statutory Provisions Involved	3
Statement of Case	6
Reasons for Granting the Writ	8
Conclusion	10
Appendix:	
Judgment Order, United States Court of Appeals	11
Order sur Motion To Dismiss, United States District Court	12

TABLE OF CITATIONS

CASES:

Bell vs. Berson, 402 U.S. 535 (1971)	8
Fuentes vs. Shevin, 407 U.S. 67 (1972)	8, 9
Goldberg vs. Kelly, 397 U.S. 54 (1970)	8
Hort vs. Commissioner, 313 U.S. 28 (1940)	9
Phillips vs. Commissioners, 283 U.S. 589 (1931)	9
Sniadach vs. Family Finance Corp., 395 U.S. 33 (1969)	8

CONSTITUTIONAL AND STATUTORY PROVISIONS:

Fifth Amendment	**3**
26 U.S.C. 6331(a)	**4, 9**
28 U.S.C. 1254(1)	**2, 3**
28 U.S.C. 1346(a)(1)	**4, 7**
28 U.S.C. Rule 12(b)(6)	**5**

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1. The Petitioner, Elizabeth M. Brady, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on December 11, 1974.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The opinion rendered by the District Court for the Eastern District of Pennsylvania also appears in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on December 11, 1974. A timely petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

1. Whether it was error for the District Court to grant Respondent's motion to dismiss for failure to state a claim since Appellant had been effectively denied due process of law by the failure of the Court's grant of post seizure hearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. 1254(1)—COURTS OF APPEALS; CERTIORARI; APPEAL; CERTIFIED QUESTIONS

Cases in the Courts of appeals may be reviewed by the Supreme Court by the following methods:

1. By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 U.S.C. 1346(a)(1)—UNITED STATES AS DEFENDANT

(a) The District Courts shall have original jurisdiction concurrent with the Court of Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws.

26 U.S.C. 6331(a)—LEVY AND DISTRAINT

(a) **Authority of Secretary or Delegate**—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer, employee, or

elected official. If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10 day period provided in this section.

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28 U.S.C. RULE 12(b)(6)—DEFENSES AND OBJECTIONS — WHEN AND HOW PRESENTED — BY PLEADING OR MOTION — MOTION FOR JUDGMENT ON PLEADINGS

(b) **How Presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

(6) For failure to state a claim upon which relief can be granted.

STATEMENT OF CASE

Petitioner, Elizabeth M. Brady, in these consolidated actions, timely filed her individual income tax returns for the calendar years of 1962, 1963 and 1964. Subsequently, she filed amended returns for each year, which were accepted by the Philadelphia District Director of the Internal Revenue as timely filed claims for refund. In each amended return, the Petitioner claimed a loss deduction, in the amount of $1,080.00, representing the annual rent from a unit she owned as a business property.

Appellant alleges that the loss of rent for each of these years was "caused by a public official failing to properly perform his duties" and "as a result of a vacuum in State law to provide an appeal channeled to a technically trained body at higher levels of Government, when those licensed individuals failed to provide the proper service, after numerous and futile attempts." Petitioner alleges that these combinations of circumstances resulted in the denial of Petitioner's "human rights, health rights, environmental rights, pursuit of happiness, rights as an owner and occupant and property rights inherent and owner of rental property by failure of the law to serve on a technical and vital matter".

Petitioner received a notice of levy, dated October 15, 1968 informing her that the Internal Revenue Service intended to levy on her bank account to satisfy the outstanding balance of $23.08 owing to the respondent. Petitioner avers that on October 26, 1968, she learned

that $23.08 had been seized from her bank account. Petitioner asserts that the seizure of the $23.08 was unconstitutional without due process of law, because a post seizure hearing was never granted to judge the constitutionality of the seizure.

Petitioner originally brought this action, after having exhausted her administrative remedies in the Internal Revenue Service, in the District Court for the Eastern District of Pennsylvania under 28 U.S.C. 1346 (a) (1).

REASONS FOR GRANTING THE WRIT

IT WAS ERROR FOR THE DISTRICT COURT TO GRANT RESPONDENT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Petitioner has been effectively denied due process of law under the Fifth Amendment by the failure to grant a post seizure hearing. The substantial issue which the Supreme Court should decide in the instant case is whether Petitioner should have been granted a post seizure hearing to determine the constitutionality of the tax seizure imposed upon her bank account.

The Supreme Court has held, in a long line of cases, *Bell vs. Berson,* 402 U.S. 535 (1971); *Goldberg vs. Kelly,* 397 U.S. 54 (1970); *Sniadach vs. Family Finance Corporation,* 395 U.S. 33 (1969), that absent exigent circumstances, pre-judgment attachment, replevin or a seizure of a person's property must be preceded by an adequate notice and hearing. The Supreme Court in *Fuentes vs. Shevin,* 407 U.S. 67 (1972), a replevin case, listed four exceptions to the above general rule where the due process requirements notice and hearing were outweighed by considerations of efficiency and timeliness. The first exception allows the pre-judgment seizure of property to take place without the accompanying notice in the hearing when the interest of governmental efficiency requires the seizure of property. Petitioner agrees that, as the Supreme

Court has ruled in *Hort vs. Commissioner,* 313 U.S. 28 (1940), the collection of unpaid tax assessments may be made through the means of a seizure of personal property without the necessity of a pre-judgment hearing. Thus the collection of unpaid tax assessments would fall under the first exception listed in *Fuentes,* supra.

Petitioner does not wish to challenge the constitutionality of Section 6331 of the Internal Revenue Code nor does she wish to challenge the constitutionality of the procedure by which her property was seized. Rather, Petitioner readily concedes that the procedure by which her property was taken is constitutional. Although that procedure was constitutional, Petitioner contends that there never was an adequate post seizure hearing. Since the seizure in this case is an exception to the general rule which requires a pre-judgment hearing prior to seizure, the Supreme Court has emphasized the importance of providing a post seizure hearing. *Fuentes,* supra; *Phillips vs. Commissioner,* 283 U.S. 589 (1931).

Petitioner does not wish to challenge the lack of due process being required to wait five and one-half years since the seizure occurred without an adequate hearing. However, Petitioner does contend, and the Supreme Court seems to agree, *Fuentes,* supra, that granting a motion to dismiss for failure to state a claim upon which relief can be granted under the Federal Rules of Civil Procedure 12(b) (6) would effectively preclude Petitioner from ever obtaining an adequate hearing at which time the propriety of the tax seizure could be contested.

CONCLUSION

For the reasons listed above, the Court should grant this petition for writ of certiorari.

Respectfully submitted,

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1616 Two Penn Center Plaza,
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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 74-1404 and 74-1405

Elizabeth M. Brady,

Appellant

v.

United States of America et al.

Appeal from the United States District Court for the Eastern District of Pennsylvania (Civil Action Nos. 70-687 and 71-1873).

Submitted under Third Circuit Rule 12(6), December 10, 1974.

Before: Aldisert, Adams and Hunter, Circuit Judges.

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

By the Court:

Aldisert,

Circuit Judge.

Attest:
Thomas F. Quinn,
Clerk.
Dated Dec. 11, 1974

Order, District Court

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action Nos. 70-687, 71-1873

Elizabeth M. Brady,

Plaintiff

vs.

United States of America,

Defendant

ORDER SUR MOTION TO DISMISS

AND NOW, this 4th day of February, 1974, the defendant's Motion to Dismiss is hereby Granted for the reasons set forth in *Hort v. Commissioner*, 313 U.S. 28 (1940); *Jerome O. Crabtree*, P-H Tax Ct. Mem. ¶60, 125 (1960); 5 Mertens, *Law of Federal Income Taxation*, §28.15; *Phillips v. Commissioner*, 283 U.S. 589 (1931); and *Enochs v. Williams Packing Co.*, 370 U.S. 1 (1962).

By the Court:
J. William Ditter, Jr.,
J.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1100

ELIZABETH M. BRADY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STRATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In these suits for refund of federal income taxes for 1962, 1963 and 1964, petitioner complains that $23.08 of the sum claimed for refund was improperly collected because she was afforded no post-seizure hearing after the Internal Revenue Service collected that amount by levy upon her bank account pursuant to Section 6331(a) of the Internal Revenue Code of 1954.

In amended income tax returns for the years in question, petitioner claimed a deduction for a loss said to have arisen when, because of the action of state and local officials, she was unable to realize rental income from part of her property (Pet. 6). It is well established that failure to realize income does not produce a deductible loss. *Hort* v. *Commissioner*, 313 U.S. 28. Accordingly, the district court dismissed petitioner's suit for refund for failure to state a claim upon which

relief could be granted, and the court of appeals affirmed. Petitioner does not now claim that this substantive decision was erroneous.

The deficiency arising from the disallowance of petitioner's claimed loss was collected, to the extent of $23.08, by levy upon petitioner's bank account pursuant to Section 6331(a). In her petition, petitioner now asserts that that was improper because she was afforded no post-seizure hearing (Pet. 8-9). However, this refund suit has afforded petitioner the very post-seizure hearing of which she claims she has been deprived. *Graham* v. *duPont*, 262 U.S. 234. See *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272, 281-285. The seizure by levy therefore fully complied with the requirements of due process. *Phillips* v. *Commissioner*, 283 U.S. 589.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1975.

DOJ-1975-04